THE ATTORNEY GENERAL OF TEXAS

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Open Records Decision No. 478

Re: Whether the Open Records Act, article 6252-17a, V.T.C.S., requires disclosure of intoxilyzer cards and logs maintained by the Texas Department of Public Safety

Dear Mr. West:

You ask about the availability to the public, under the Texas Open Records Act, article 6252-17a, V.T.C.S., of certain intoxilyzer cards and logs maintained by the Texas Department of Public Safety. A man convicted of driving while intoxicated asked the Texas Department of Public Safety to provide him with intoxilyzer test record cards relating to himself, his son, and another individual, as well as access to a portion of the department's intoxilyzer log. The requestor's son and the other individual whose card has been requested were arrested on the same day and in the same locale as the requestor and, like the requestor, took an intoxilyzer test. The portion of the log sought by the requestor refers to several people who submitted to intoxilyzer tests immediately before and after the requestor. The requestor is appealing his D.W.I. conviction and wishes to submit a number of these other tests to a private laboratory for examination of possible errors in the testing equipment.

The intoxilyzer cards contain the name and date of birth of the subject of the test; the intoxilyzer model and serial numbers; the location of the instrument; the name, certification number, and agency affiliation of the intoxilyer operator; the date and time of the test; the officer by whom the test was administered; and the level of alcohol concentration revealed by the test. The intoxilyzer logs contain the date and sequential time of intoxilyzer tests given on the particular date; the name of the subject of each test; the name and certification number of the test operator; the test record number; the level of alcohol concentration revealed by each test; and miscellaneous remarks of the arresting officer.

The department provided the requestor with a copy of his own intoxilyzer test results pursuant to section 3(e) of article 6701l-5, a provision that grants a special right of access to the subject of an

intoxilyzer test or to the subject's attorney. Consequently, the only two categories of information at issue are (1) the intoxilyzer test results and details of two named individuals, and (2) the intoxilyzer test results and details of a certain number of persons tested immediately before and after the requestor. The requestor is not interested in receiving the names of the subjects of the second category. As indicated, the requestor simply wants the second category of information in order to challenge the accuracy of the test. He seeks this information through the Open Records Act.

Under the Open Records Act, all information held, as described in section 3(a), by a governmental body must be released unless the information falls within one of the act's specific exceptions to disclosure. Open Records Decision No. 464 (1987). You suggest that sections 3(a)(1), 3(a)(3), and 3(a)(8) could protect the information at issue here. Section 3(a)(1) protects from required public disclosure

> information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

Section 3(a)(1) incorporates statutory confidentiality, common-law privacy, and constitutional privacy. Open Records Decision No. 470 (1987).

Your primary argument is that a statute, section 3(e) of article 6701l-5, V.T.C.S., makes this information confidential. Section 3(e) provides:

> Upon the request of a person who has given a specimen at the request of a peace officer, full information concerning the analytical results of the test or tests of the specimen shall be made available to him or his attorney.

As indicated, the department provided the requestor with a copy of his own test results pursuant to this provision. You suggest that section 3(e) constitutes a statutory grant of confidentiality with regard to all persons other than the person who submitted to the test -- i.e., the general public. This would prevent the requestor from obtaining information about other individuals taking the test.

As a general rule, the statutory confidentiality protected by section 3(a)(1) requires express language making certain information confidential or stating that information shall not be released to the public. The legislature enacted section 3(e) several years prior to the 1973 enactment of the Open Records Act. See Acts 1969, 61st Leg., ch. 434, at 1468. At this time, the common law protected criminal

investigation files from public disclosure. See Attorney General Opinion H-861 (1976). Section 3(e) created a special exception to this confidentiality; it did not make these criminal investigation files confidential. The Open Records Act replaced the common-law protection for criminal investigation files with section 3(a)(8). See id. The Open Records Act did not, however, implicitly repeal or replace section 3(e) because the Open Records Act does not govern special rights of access. See Open Records Decision No. 464 (1987). In Attorney General Opinion JM-757 (1987), this office determined that the Open Records Act implicitly repeals only inconsistent provisions. See also Open Records Decision No. 465 (1987). Section 3(e), however, remains simply a special grant of access to certain information; it does not invoke the protection of section 3(a)(1) of the Open Records Act.

Section 3(a)(1) also incorporates common-law privacy. Texas courts recognize four categories of common-law privacy: (1) appropriation (commercial exploitation of the property value of one's name or likeness), (2) intrusion (invasion of one's physical solitude or seclusion), (3) public disclosure of private facts, and (4) false light in the public eye (a theory analogous to defamation). For obvious reasons, the last two of these arise most frequently in the context of the Open Records Act. In Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 682 (Tex. 1976), cert. denied, 430 U.S. 931 (1977), the Texas Supreme Court set forth the primary test for the "public disclosure of private facts" privacy protection applicable under section 3(a)(1) of the Open Records Act. Information may be withheld under section 3(a)(1) only if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See 540 S.W.2d at 683-85. A governmental body may withhold information under section 3(a)(1) on the basis of "false light" privacy only if it finds that release of the information would be highly offensive to a reasonable person, that public interest in disclosure is minimal, and that there exists serious doubt about the truth of the information. Open Records Decision No. 438 (1986).

The information at issue here does not fall within the realm of common-law privacy under section 3(a)(1). Information relating to drug overdose, acute alcohol intoxication, and emotional distress ordinarily may be withheld under common-law privacy. Not all medically-related information, however, is protected by this aspect of section 3(a)(1). Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d at 681-82. See Open Records Decision No. 370 (1983). The fact that a person has submitted to an intoxilyzer test at the request of a public safety officer may meet the first part of the test because it may be highly intimate and

embarrassing. On the other hand, it is of legitimate public interest that a driver on public roads may have been driving while under the influence of alcohol or other intoxicants. As indicated, common-law privacy requires that both parts of the test be met -- that the information is highly intimate and embarrassing such that its release would be objectionable and that the information is of no legitimate public interest. For similar reasons, false light privacy is also inapplicable.

In Industrial Foundation of the South v. Texas Industrial Accident Board, supra, the court recognized that section 3(a)(1) protects constitutional privacy as well as common-law privacy. Like common-law privacy, the constitutional privacy protected by section 3(a)(1) has several different aspects. The Industrial Foundation court indicated that constitutional privacy protects information within the "zones of privacy" described by the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) and Paul v. Davis, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. The constitutional right to privacy consists of two related interests: (1) the individual's interest in independence in making certain kinds of important decisions, and (2) the individual's interest in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy." The second interest, in non-disclosure or confidentiality, is somewhat broader. Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981). In other words, information need not necessarily fall into one of the "zones of privacy" to be protected by constitutional privacy principles.

In Open Records Decision No. 455 (1987), the attorney general discussed Fadjo v. Coon, supra, and other recent developments in federal decisions on constitutional disclosural privacy and concluded that, unlike the two-part common-law privacy test articulated in the Industrial Foundation case, the test for determining whether private information may be publicly divulged without violating constitutional disclosural privacy rights is a balancing test. In other words, the test requires balancing the private interest with the public interest. Finding a legitimate public interest in disclosure will not alone suffice to make the information public. Nevertheless, the information at issue here does not constitute an "intimate aspect of human affairs" such that it warrants constitutional protection. See Open Records Decision No. 455. By driving on public roadways, individuals take what might otherwise be private behavior out of the realm of strictly personal affairs for purposes of the constitutional test. Consequently, the intoxilyzer cards may not be withheld under section 3(a)(1) of the Open Records Act.

You also inquire about sections 3(a)(3) and 3(a)(8). You suggest that section 3(a)(3), however, does not apply because you do not

anticipate litigation. To claim the protection of section 3(a)(3), a governmental body must show (1) that actual litigation exists or is "reasonably anticipated," (2) that the information in question relates to that litigation, and (3) that withholding the information is necessary to protect the governmental body's strategy or position in the litigation. See Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 452 (1986). The context of your letter makes it clear that you do not anticipate civil litigation. Section 3(a)(3), however, also encompasses criminal litigation. As indicated, the requestor was convicted of D.W.I. and plans to appeal his conviction. Section 3(e) of the Open Records Act provides that a governmental body is a party to litigation of a criminal nature for purposes of section 3(a)(3) "until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court." Nevertheless, when a governmental body requests an open records decision from the attorney general, the governmental body must state which exceptions apply and why. Open Records Decision No. 252 (1980). Consequently, because you reject section 3(a)(3), this decision does not address whether section 3(a)(3) applies to the information at hand.

Section 3(a)(8), known as the "law enforcement" exception, excepts from required public disclosure:

> records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

Information is excepted from disclosure by section 3(a)(8) if release of the information will unduly interfere with law enforcement and crime prevention. Open Records Decision No. 456 (1987).

You suggest that section 3(a)(8) might be inapplicable here because the criminal investigation of the incident involving the request has been resolved. The "law enforcement" exception protects "blood or other lab tests" contained in police reports. Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 187 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd per curiam, 536 S.W.2d 559 (Tex. 1976); Attorney General Opinion H-861 (1976). When the results of lab tests have been prepared for the purpose of possible prosecution for a criminal offense, the results are excepted from required public disclosure by section 3(a)(8). Attorney General Opinion H-861; Open Records Decision No. 127 (1976). In Open Records Decision No. 272 (1981), this office indicated that once a criminal

investigation has been completed, the results of blood alcohol tests related to the investigation can no longer be withheld. The status of the criminal investigation related to the other intoxilyzer tests sought by the requestor is therefore relevant. The circumstances surrounding these tests may be relevant to the other criminal investigation. For example, the record shows that the requestor and the specified individuals may have been together prior to the arrest. You do not indicate whether the criminal investigation involving the two individuals to whom the tests relate has been resolved. You may withhold from public disclosure the intoxilyzer details and results that relate to pending criminal investigations or prosecutions. You may not, however, withhold those related to closed cases. Nor may you withhold intoxilyzer results from the subjects of tests when the subjects request those test results pursuant to the right of access granted by section 3(e) of article 6701l-5.

S U M M A R Y

Under section 3(a)(8) of the Texas Open Records Act, article 6252-17a, V.T.C.S., the Texas Department of Public Safety may withhold from required public disclosure intoxilyzer test details and results that relate to pending criminal investigations and prosecutions. The department may not, however, withhold intoxilyzer results related to closed cases. Nor may the department withhold intoxilyzer test results from the subjects of those tests when the subjects request those results pursuant to the right of access granted by section 3(e) of article 6701l-5, V.T.C.S. Section 3(a)(1) of the Open Records Act does not protect these intoxilyzer details and results. This opinion does not address whether these test results may be withheld under section 3(a)(3) because the department expressly rejects reliance on this section.

Very truly yours,

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